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Supreme Court, U.S.
FILED
OCT 12 1984
ALEXANDER L. STEVAS
CLERK

No. 84-392

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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MORRIS L. THIGPEN, COMMISSIONER, et al.,

Petitioners,

- vs. -

WILLIE N. REDDIX,

Respondent.

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# BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Can a death sentence stand absent a finding that the defendant killed, attempted to kill, or intended that a killing take place when:

(i) the state supreme court affirmed the death sentence on the basis of felony-murder/accomplice liability;

(ii) the only instructions given the jury imputed the actions and intent of the accomplice to the defendant; and

(iii) proposed instructions that would have focussed the jury on the extent of the defendant's involvement and intent were refused?

2. Does 28 U.S.C.§ 2254(d) require deference to a state supreme court ruling explicitly presuming intent from the facts of felony-murder and the state felony-murder rule?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Constitutional Statutory Provisions Involved | 1 |
| Statement of the Case | 2 |
| Reasons for Denying the Writ | 15 |
| Certiorari Should Be Denied Because The Court of Appeals Was Correct In Affirming The Grant Of Habeas Corpus To A Defendant Who Was Sentenced To Death Without A Finding By Any Court At Any Stage Of The Proceedings That He Killed, Attempted To Kill Or Intended That A Killing Take Place | 15 |
| A. A Death Sentence Cannot Be Imposed Absent a Finding of Intent by Some State Court | 15 |
| B. There Was No Finding By The Mississippi Supreme Court | 20 |
| Conclusion | 23 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| Beck v. Alabama, 447 U.S. 625 (1980) | 6 |
| California v. Ramos, ____ U.S. ____, 77 L.Ed.2d 1171 (1983) | 16 |
| Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982) | 8 |
| Culberson v. State, 379 So.2d 499 (Miss. 1979) | 9 |
| Drake v. Francis, 727 F.2d 990 (11th Cir. 1984), reh'g en banc granted, 727 F.2d 1003 (11th Cir. 1984) | 18, 19 |
| Eddings v. Oklahoma, 455 U.S. 104 (1980) | 16 |
| Enmund v. Florida, 458 U.S. 782 (1982) | 14, 15, 16, 17, 18, 22 |
| Green v. Zant, 738 F.2d 1529 (11th Cir. 1984) | 18 |
| Griffin v. State, 293 So.2d 810 (Miss. 1974) | 6 |
| Henry v. Wainwright, 721 F.2d 990 (11th Cir. 1983) | 18 |
| Hopper v. Evans, 456 U.S. 605 (1982) | 7 |

| Cases: | Page |
|---|---|
| Jones v. Thigpen, ____ F.2d ____, No. 83-4085 (5th Cir. September 17, 1984) ..... | 15 |
| LaValle v. Delle Rose, 410 U.S. 690 (1973) ..... | 22 |
| Lockett v. Ohio, 438 U.S. 586 (1977) ..... | 16, 20 |
| Marshall v. Lonberger, ____ U.S. ____, 74 L.Ed.2d 646 (1983) ..... | 22 |
| Price v. State, 362 So.2d 204 (Miss. 1978) ..... | 9, 20 |
| Ross v. Hopper, 712 F.2d 1528 (11th Cir. 1983), reh'g en banc granted, 729 F.2d 923 (11th Cir. 1984) ..... | 18, 19 |
| Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974) ..... | 19 |
| Sandstrom v. Montana, 442 U.S. 510 (1979) ..... | 8, 16, 21 |
| Stanley v. State, 240 Ga. 341, 241 S.E. 2d 173 (1977) ..... | 19 |
| Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983) ..... | 19 |

| Statutes: | |
|---|---|
| 28 U.S.C. § 2254(d) ..... | 17 |
| F.R.A.P. 4(a) ..... | 12 |
| F.R.A.P. 26(a) ..... | 12 |
| F.R.C.P. 60(b) ..... | 11 |
| Miss. Code Ann. § 97-3-19 ..... | 1, 6, 17 |
| Miss. Code Ann. § 97-3-27 ..... | 6 |
| Miss. Code Ann. § 99-19-101 ..... | 1, 2 |
| Miss. Code Ann. § 99-19-101(5) ..... | 1 |

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Respondent, WILLIE N. REDDIX, prays that the Court deny the petition for certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit affirming the grant of the writ of habeas corpus insofar as it vacated his death sentence.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions cited by the petitioners, this case involves Mississippi Code Ann. § 97-3-19(2), which provides in relevant part:

> The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> ...
>
> (e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape burglary, kidnapping, arson, robbery, ... or in the attempt to commit such felonies....

(emphasis added). It also involves Mississippi Code Ann. § 99-19-101(5), which provides in relevant part:

> Aggravating circumstances shall be limited to the following:
>
> . . .
>
> (a) The capital offense was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, aircraft piracy, ....

(emphasis added). [1/]

STATEMENT OF THE CASE

At the time of the crime, Willie Reddix was a mildly retarded eighteen-year-old black who could barely read and write. He and Larry Jones asked Reddix's brother, J.D., to drive them uptown. They parked, and Willie Reddix entered Art's Levis. He asked the proprietor, Art Weinberger, to show him some coats. While he was doing so, Jones entered the store and hit Weinberger in the head several times with a Stilson wrench. Jones dragged the victim into the office, where he lay bleeding. At that time, Reddix "had no idea that the man was dead." R. 717.[2/] Jones and Reddix took

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1/ In March of 1983, Mississippi amended § 99-19-101 and added subsection (7), which provides that:

> In order to return and impose a sentence of death, the jury must make a written finding of one or more of the following:
>
> (a) The defendant actually killed;
>
> (b) The defendant attempted to kill;
>
> (c) The defendant intended that a killing take place;
>
> (d) The defendant contemplated that lethal force would be employed.

Manifestly, Reddix's jury was not required to and did not make any of these findings because this provision was not in effect at the time of his 1977 trial. Nor did the Mississippi Supreme Court make corrective findings; the statute was not yet in effect at the time of Reddix's 1980 appeal.

2/ References to the two volume record on appeal are designated by R.___. References to the state trial transcript and record are designated by Tr.___.

items of clothing from the store and $101.00 in cash from the register.

The victim was later discovered and taken to the hospital. He died without regaining consciousness.

Willie Reddix confessed to Officer Florian Tichell, a black who was a friend and neighbor of Reddix's mother and who had known Willie Reddix since the age of eight. Tr. 168, 176. Tichell wrote down Reddix's oral confession, Tr. 184; Reddix initialed each page and then signed. Tr. 185-87. This procedure was necessary because Reddix was illiterate at the time of his arrest and confession. Reddix did not learn to read until he was on death row at Parchman; three other death row inmates taught him to read during yard call. Tr. 253, 274-75.

Dr. Davis, the state psychiatrist who examined Reddix prior to the first trial and just three months after the arrest and confession, noted "auditory and visual hallucinations," and found that Reddix was "currently functioning on a psychotic level and that he would fit in the diagnostic category of mental retardation, mild, with psychosis." Tr. 20.[3/] He later [4/] observed that: "Because of his low intellect

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3/ This was corroborated by a second doctor who found "paranoid ideations," and that: "His orientation to time, place, and person was questionable.... He presented a delusional belief system and possible hallucinations. His thought and association appeared to be loose." Tr. 22 (Roger O. Fox, Ed.D.).

4/ As part of the motion for reconsideration in the federal habeas proceeding, Reddix proffered the affidavit of Dr. Davis, the psychiatrist who examined Reddix in 1975. He would have testified "that Mr. Reddix was psychotic at the time I first saw him in 1975." R. 207. Moreover, it was "clear" to the doctor "that Mr. Reddix was not feigning in any way the symptoms he exhibited in the 1975 interview." R. 208.

Mr. Reddix is an individual who is easily led, particularly by someone he looked up to, and he may often be unaware of the specific consequences of his decisions. Additionally, the time I saw Mr. Reddix he was very vulnerable to outside influences either because of his low intellect or the psychosis, singly or in combination." R. 208.

The proof at trial consisted of the testimony of three witnesses who saw one or more black men leave Weinberger's store; one witness who recognized Reddix as one of those men; the doctor who tended Mr. Weinberger at the hospital; physical evidence consisting of a pair of bloody boots belonging to Jones and a footlocker with merchandise, both recovered from Mrs. Reddix's house; testimony identifying the merchandise as coming from the store; and the confession. Reddix v. State, 381 So.2d 999, 1001-03 (Miss. 1980); A. 56-64. The only evidence concerning what occurred in the store during the robbery and the role Reddix actually played in the death of Weinberger was Reddix's own statement.

Thus, there was absolutely no evidence before the jury tending to show that Reddix killed Weinberger. The only evidence was Reddix's statement that Jones hit Weinberger with the wrench. This was corroborated by the blood found on Jones's boots. The prosecutor conceded the point:

> A. (By Willie Reddix) It depends on what you say I done.
>
> Q. Well, I know you didn't hit Mr. Weinberger. I don't accuse you of that. You didn't hit him.
>
> A. No, sir.
>
> Q. I know you didn't hit him. But you were there when he was hit.

Tr. 269.

Similarly, there was no evidence concerning Reddix's intent. The only bit of evidence was Reddix's statement that: "J.D. Reddix . . . did not know anything about the plan that Larry and I had in mind." R. 717. There was no evidence regarding the details of "the plan;" the investigating officer, Tichell, affirmatively declined to find out.[5/] Even after-the-fact, Willie Reddix did not know that

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5/ Like the Mississippi Supreme Court, see discussion below, Officer Tichell presumed what "the plan" was without inquiring into Reddix's actual intent.

Q. Everything that he said from the time you started, "I, Willie Reddix" to the time that he said that Larry had just the Stilson wrench, everything that he said during that period of time is here in this statement?

A. That's right.

Q. Did you ask him to explain what he meant by "the plan that Larry and I had in mind?"

A. The plan?

Q. Yes.

A. I knew what plan he had in mind. I didn't have to ask him.

Q. That was in your mind what you knew; is that correct?

A. That's right.

Q. But you didn't ask him to explain it?

A. No.

Q. All right. Then you would agree that you didn't know what that plan was, do you?

A. No.

Q. According to what Willie Reddix was telling you that day?

A. No.

Tr. 721.

Weinberger had been killed. He said: "I had no idea that the man was dead." R. 717. Before leaving the scene, "I went in the office to see was Mr. Art dead, but he was still breathing, so I put his coat under his head...." R. 717. If the plan had been to kill Weinberger, Reddix did not seem to be in on the plan.

The instructions that the court gave the jury failed to pose the question of the content of "the plan" or the issue of intent to kill. The trial court refused proposed defense instructions 6 and 7 that would have placed before the jury the question of Reddix's intent in a clear manner. Instruction 7 would have allowed the jury to return a guilty verdict on the lesser included offense of robbery.[6/] More importantly, instruction 6 would have squarely confronted the jury

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6/ Proposed defense instructions 1-4 would have put the lesser included offenses of shoplifting, misdemeanor/murder, Miss. Code Ann. § 97-3-27, see, e.g., Griffin v. State, 293 So.2d 810 (Miss. 1974), and larceny/noncapital murder, Miss. Code Ann. § 97-3-19(1)(c) (Supp. 1983), before the jury. These too were refused. Tr. 798-801.

The failure to give the lesser included offense instructions was clear constitutional error under Beck v. Alabama, 447 U.S. 625 (1980), and is an alternative ground that supports the judgment below. As in Beck, Reddix "was also involved in a robbery in the course of which a murder occurred. He contended, however, that he did not kill the victim or intend his death. Instead, he claimed that ... his accomplice unexpectedly struck and killed the [80-year-old] man." Hopper v. Evans, 456 U.S. 605, 609 (1982)(describing Beck v. Alabama, 447 U.S. at 629-30).

As in Beck, the Court erred in failing to give the lesser included offense instructions because it left the jury with only two options: convict the defendant of capital murder or acquit him. Faced with these options only, the jury was forced to err either to leniency and acquit if it felt the evidence did not support a capital verdict or to convict of a capital offense if the evidence did not allow for innocence of all criminal involvement.

with the question whether the killing of Weinberger was part of "the plan."

> The Court instructs the jury that when several persons are involved in the perpetration of a crime and one of them commits a fatal act which was a fresh and independent product of the mind of the perpetrator outside of or foreign to the common design, then the others are not criminally liable for the fatal act of the perpetrator. The Court instructs the jury that if you find that there is a reasonable doubt that the fatal act of Larry Jones was a fresh and independent product of his mind outside or foreign to the common design between he and the Defendant, Willie N. Reddix, then you must find the Defendant, Willie N. Reddix, not guilty.

Tr. 803.

Instead, the court gave instructions, set out in full in the petition at 20-21, that a reasonable juror could have understood to impute Jones's intent to Reddix. Instruction S-1 focuse . the jury on the accomplice liability theory. It defined "capital murder as murder done with any design to effect death by any person" during the course of a robbery. Tr. 812 (emphasis added). It asked the jury whether, while engageo in a robbery, "Willie N. Reddix, acting in concert with another, struck the said Arthur Weinberger and killed him with an instrument, to wit: a wrench with the formed purpose to effect his death...." Id. (emphasis added). Since it is clear, as the state conceded, that Willie Reddix did not strike the victim, the jury could have convicted him under this instruction only if it imputed Jones's actions and intent to Reddix under the "acting in concert with another" language.

Similarly, instruction S-2, the only other substantive instruction given tc the jury, focussed the jury in the same

direction. It again asked the jury whether "the Defendant, Willie N. Reddix, was engaged in the criminal act of Robbery" and, if so, whether "the Defendant acting in concert with another did unlawfully, wilfully [sic], feloniously and of their malice aforethought kill and murder Arthur Weinberger ...." Tr. 813 (emphasis added). Since it is undisputed that Willie Reddix did not kill Weinberger, the jury could have convicted him only if it imputed Jones's wilful action to Reddix on the basis of the "acting in concert" language. This misunderstanding was compounded by the focus on "their" intent, rather than Reddix's.[7/]

The jury returned a general verdict of guilt. Tr. 757. The instructions to the jury at the penalty phase presented no question of intent. Tr. 814-15. The jury found as aggravating circumstances that the murder was heinous, atrocious, and cruel; that the defendant had a prior conviction for a felony involving the use or threat of violence; and that the

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7/ The state emphasizes the reference in the instruction to "their malice aforethought" as buttressing its claim that there was a finding of intent. But taking the charge as a whole, as the state concedes it must -- see Petition at 26-27 n.3 -- there can be little comfort to the state's argument in the use of the word "their." First, since the entire charge focussed on the actions of Reddix "in concert with another," the instruction to consider "their" intent only reinforced the notion of imputed liability. Second, only Reddix was on trial. Jones's case was severed and tried separately. Thus, there was no reason to focus the jury on any other's intent but Reddix's--his malice aforethought. By interpolating "their" intent, the instruction invited the jury to consider Jones's intent to kill, which would have been relevant only if it was imputed to Reddix. Finally, it is clear that a reasonable juror could have understood the instruction in that way. That alone suffices to invalidate the instruction. Sandstrom v. Montana, 442 U.S. 510, 519 (1979); Clark v. Louisiana State Penitentiary, 694 F.2d 75, 78 (5th Cir. 1982).

murder was committed while the defendant was engaged in the commission of a robbery. Tr. 783-84.

On appeal, the Mississippi Supreme Court concluded that: "It was not necessary that appellant have any design to effect the victim's death, while appellant was engaged to [sic] the commission of the crime of robbery." 381 So.2d at 1011; A. 102. It was enough that there was a plan to rob and death resulted.

> He and Jones, his accomplice, had a plan for and in what they were about. It is argued that the record does not show what the plan was. The poet said that the best study of mankind is man, and the Holy Writ says, "By their fruits ye shall know them." There is no showing in this record that anything unanticipated occurred, to throw them off balance or to change their course.

Id. at 1011-12; A. 102. The court then discussed its felony-murder cases[8/] and expressly relied on traditional felony-murder, accomplice liability:

> It is familiar law that when two or more persons act in concert, with a common design, in committing a crime of violence upon others, and a homicide committed by one of them is incident to the execution of the common design, both are criminally liable for the homicide.... The fact that the accused did not fire the fatal shot does not relieve him of criminal responsibility for the death ... by the accused's confederate in carrying out the common design to rob.

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8/ The court also discussed a prior death penalty case which held it was enough that "the appellant schemed and participated in the unlawful undertaking which resulted in death." 381 So.2d at 1012; A. 103 (quoting Culberson v. State, 379 So.2d 499 (Miss. 1979)).

It is noteworthy that, in quoting the Mississippi Supreme Court opinion, the state misrepresents it by stopping with the discussion of Culberson and eliding the discussion of Price. Petition at 49-50. It does so to create the illusion that the opinion contains a factual finding and not the straight felony-murder analysis that is expressed in clear terms when viewed in context.

381 So.2d at 1012; A. 104 (quoting Price v. State, 362 So.2d 204, 205 (Miss. 1978)) (emphasis added). Thus, it is clear that the Mississippi Supreme Court found it enough that Reddix planned and participated in the common design to rob. Similarly, the Mississippi Supreme Court recognized that in all its prior cases, "there is no death sentence of one not physically acting or assisting in the killing, as is situation here." 381 So.2d at 1012; A.106.[9/]

Reddix's habeas petition raised several constitutional errors vitiating both the conviction and sentence, including, inter alia: the admission of Reddix's involuntary and uncounseled confession; the exploitation of Reddix's undisclosed second, post-arrest statement; the failure to charge lesser included offenses of noncapital murder, manslaughter and robbery; the racially discriminatory nature of the death penalty in Mississippi; and the excessiveness of the death penalty in light of the failure to prove or find that Reddix killed, attempted to kill, or intended that a killing take place.

The case was assigned to Judge William Harold Cox. On February 26, 1982, he granted Reddix's motion for leave to amend, for leave to take discovery, and for an evidentiary hearing. The amended petition was filed on March 8, 1982.

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9/ The Mississippi court sought to counterbalance this admission with the assertion that: "Neither is it true that there was one planned and executed in more deliberate fashion than the one now before us." 381 So.2d at 1012; A 106. But that observation does not speak to who planned the murder; Reddix's liability was premised on his involvment in the plan to rob.

The hearing was reset from September 13 to October 18, 1982, and then again to November 22, 1982. On October 8, 1982, Reddix filed a motion for summary judgment. A countermotion was filed by the state on October 11. Reddix also filed motions for allowance of expert witness fees and to compel discovery.

In findings of fact and conclusions of law dated November 10, 1982, and filed on November 12th, Judge Cox denied all of Reddix's motions and granted the state's countermotion for summary judgment, dismissing the habeas petition. On December 7, 1982, Reddix filed a motion for reconsideration under F.R.C.P. 60(b). In it, Reddix asked for "reconsideration of the Findings of Fact and Conclusions of Law entered on November 12, 1982 dismissing his Petition...." R. 188. The motion stated as grounds for reconsideration: (1) that the court ruled without affording Reddix the scheduled evidentiary hearing; (2) that the state had failed to answer the interrogatories and requests for admission that the court had granted leave to file; (3) that material issues of fact existed; and (4) that, therefore, summary judgment in favor of the state was not proper. R. 188-89. On January 20th, Judge Cox entered an order granting the writ.[10/]

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10/ On December 13, 1982, Reddix dispatched what would have been a timely notice of appeal from the November 12 dismissal. See F.R.A.P. 4(a) and 26(a). (December 12, 1982, the 30th day after the entry of judgment, was a Sunday.) It was not received by the clerk and filed until December 16, 1982. There was no determination of the question of excusable neglect under F.R.A.P. 4(a)(5), however, because the district court determined to consider and grant Reddix's prior motion for reconsideration.

Judge Cox's January 20th opinion explained that he had requested a full transcript of the state court trial and that it revealed Reddix's guilt only as an accomplice to the murder committed by Larry Jones. Reddix v. Thigpen, 554 F.Supp. 1212, 1213 (S.D.Miss. 1983); A. 36. Based on "[a] careful search and close examination" of the record, id. at 1213; A. 39, Judge Cox concluded that there was "no proof, or showing of any kind . . . of his intent or preparation to kill this elderly white storeowner." Id. at 1214; A. 43. Rather, he concluded that the Mississippi Supreme Court's "finding" of intent was no more than a "bold inference." Id. Accordingly, he granted Reddix's motion to reconsider "my former order in this matter . . .., and the previous order mentioned is withdrawn and vacated." Id. at 1215; A.45. Judge Cox granted the writ, vacating the judgment of death. In addition, Judge Cox ordered Reddix released because, in his view, Reddix had already served "more [time] than any court could properly or fairly impose upon him for the commission of this crime of robbery...." Id.

The state appealed. The court of appeals, Chief Judge Charles Clark and Judges Garza and Jolly, reversed the grant of the writ with regard to the conviction but affirmed the

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10/ On December 13, 1982, Reddix dispatched what would have been a timely notice of appeal from the November 12 dismissal. See F.R.A.P. 4(a) and 26(a). (December 12, 1982, the 30th day after the entry of judgment, was a Sunday.) It was not received by the clerk and filed until December 16, 1982. There was no determination of the question of excusable neglect under F.R.A.P. 4(a)(5), however, because the district court determined to consider and grant Reddix's prior motion for reconsideration.

grant of the writ as to the sentence of death. It noted, as had the district court, 554 F.Supp. at 1213; A.37, that the Mississippi statute "defines capital murder as a killing done 'with or without any design to effect death,' by anyone engaged in the commission of certain crimes, one of which is robbery." Reddix v. Thigpen, 728 F.2d 705, 708 (5th Cir. 1984); A. 19. [11/] It held that: "The state may omit the specific intent as an element of a capital crime without transgressing the eighth amendment, and, consequently, may convict an accused of that capital offense without requiring the jury to find personal intent to kill." Id. at 709; A. 20. But it held that the death sentence was unconstitutional because it had been imposed without regard to Reddix's personal intent. It reviewed the jury instructions and concluded that: "A reasonable juror carefully heeding these instructions could conclude that Jones's intent to commit murder may be imputed to Reddix. That imputation is exactly what Enmund and the eighth amendment prohibit in death

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11/ The state's petition notes that the indictment charged Reddix and his accomplices with killing the victim "willfully and feloniously with malice aforethought." Petition at 17. In a lenghty footnote, footnote 2, the state cites Mississippi case law for the proposition that these terms are synonymous with "an actual intent to kill." Id. at 19. In attempting to suggest that there was a finding of intent, the footnote is misleading. All of the cited cases predate 1974, the effective date of the capital murder statute under which Reddix was tried and convicted in 1977. Under that statute, neither premeditation nor intent to kill is an element of the offense of capital murder. As indicated above, premeditation was not an issue put to Reddix's jury or decided on his state appeal. To the contrary, the Mississippi Supreme Court explicitly relied on the principle of felony-murder, accessorial liability to uphold the capital murder conviction and the death sentence.

penalty cases." Id. at 709; A. 22-23. It therefore concluded that the jury verdict did not embody the finding of personal intent necessary under Enmund for the imposition of a death sentence. Id. 12/

On rehearing, the court clarified what had been explicit in the briefs and at oral argument: that there was no relevant finding by the Mississippi Supreme Court requiring deference under § 2254(d). It noted that:

> The supreme court, however, made no specific finding that Reddix had a personal intent to kill. It said only, "'By their fruits ye shall know them.' There is no showing in this record that anything unanticipated occurred, to throw them off balance or to change their course." To the extent that this statement qualifies as a factual finding at all, we agree with the district court, 554 F.Supp. 1212 (D. Miss. 1983), that even under the deferential standard of Sumner, it does not supply the finding of personal intent required by Enmund.

Reddix v. Thigpen, 732 F.2d 494, 495 (5th Cir. 1984); A. 5.

The court of appeals affirmed the grant of the writ with regard to Reddix's death sentence and remanded the case to the district court to enter an appropriate order determining Reddix's other constitutional claims, including the admissibility of the confession. 728 F.2d at 712 n. 7; A. 33-34.

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12/ In its lengthy footnote 2 concerning the meaning of the term "malice aforethought" as used in the indictment, the state concludes that "a finding of 'malice aforethought' ... implies a deliberate design to effect death or, at the very least, an intent to inflict great bodily harm that might reasonably be calculated to result in death." Petition at 19. But, as pointed out by the court of appeals and as detailed above, the jury was not instructed to determine whether Reddix actually acted with "malice aforethought" in this sense. Rather, because of the imputed intent instructions, the jury verdict did not determine Reddix's own intent.

## REASONS FOR DENYING THE WRIT

CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS WAS CORRECT IN AFFIRMING THE GRANT OF HABEAS CORPUS TO A DEFENDANT WHO WAS SENTENCED TO DEATH WITHOUT A FINDING BY ANY COURT AT ANY STAGE OF THE PROCEEDINGS THAT HE KILLED, ATTEMPTED TO KILL, OR INTENDED THAT A KILLING TAKE PLACE

Certiorari should be denied because this case concerns nothing more than the application of squarely controlling precedent. The court of appeals was plainly correct in holding that Reddix's death sentence cannot stand under Enmund v. Florida, 458 U.S. 782 (1982), because no state court at any stage of the proceedings determined the issue of Reddix's intent to kill. The state argues first that the court below erred because Enmund is "substantive" and not "procedural"[13/] -- i.e., that there need not be a finding of any of the factual criteria that Enmund required as a predicate to a death sentence. As a fallback, it claims that the courts below failed to accord deference to a presumed "finding" of the Mississippi Supreme Court. Neither of these propositions withstands analysis and neither presents a question worthy of review by this Court in this case.

A. A Death Sentence Cannot Be Imposed Absent a Finding of Intent by Some State Court:

Enmund, of course, does create a substantive bar to the imposition of a death sentence on one who neither

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13/ In truth, the state would like to have it both ways. In the case of Reddix's accomplice who actually struck the fatal blow, the state argued "that Enmund's holding is merely procedural and should therefore be applied only prospectively." Jones v. Thigpen, ___ F.2d ___, No. 83-4085, Slip op. at 5717 (5th Cir. September 17, 1984).

killed, attempted to kill, nor intended that a killing take place. But every substantive rule necessarily carries procedural implications. Substantive law defines the standard of negligence, but to establish liability in any given case there must be findings of fact, made pursuant to appropriate procedures, that establish that the defendant's conduct falls within the substantive standard. If a state establishes intent as an element of an offense, there are procedural requirements that must be met to insure that the jury makes appropriate findings. See Sandstrom v. Montana, 442 U.S. 510 (1979).

This principle is no less axiomatic in death cases. Indeed, "the Court's principal concern has been more with the procedure by which the State imposes the death sentence than with the substantive factors...." California v. Ramos, ___ U.S. ___, 77 L.Ed.2d 1171, 1179 (1983) (emphasis in original). See, e.g., Lockett v. Ohio, 438 U.S. 586, 606 (1977)(eighth amendment requires "individualized consideration of mitigating factors"); Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1980)(State courts "may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding it from their consideration.").

In arguing that Enmund somehow dispenses with ordinary legal procedures requiring findings, the state places primary reliance on the passage that notes "the absence of proof" as the vice in Earl Enmund's case. Petition at 28-29 (citing Enmund, 458 U.S. at 801). But the state misconstrues Enmund because it fails to account for the procedural posture

in which the issue was presented. In Enmund, there was a finding by the trial court that Earl Enmund had "planned the capital felony...." 458 U.S. at 806 (O'Connor, J., dissenting). The constitutional vice was that "as construed by the Florida Supreme Court, the record ... d[id] not warrant [this] finding ...." Id. at 796 (majority opinion). Thus, Enmund did not dispense with the necessity of a finding on the issue of intent. To the contrary, it required that that finding be supported by the record and affirmed by the state appellate court.[14/]

The vice in this case is that Mississippi law totally dispensed with the necessity of any findings on the question of intent. The Mississippi statute does not require intent as an element of capital murder, defining it as: "The killing of a human being ... [w]hen done with or without any design to effect death...." Miss. Code Ann. § 97-3-19(2). Although the indictment charged malice, the jury was not required to determine Reddix's intent. Rather, the instructions allowed the jury to consider a "design to effect death by any person," Tr. 812 (emphasis added), and asked it to assess the defendant's responsibility for "acting in concert with another," Tr. 812, 813, pursuant to "their" amalgamated intent. Id. On appeal, the Mississippi Supreme Court clearly ruled that no finding of intent was required: "It was not

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14/ This should be axiomatic. The integrity of the state court systems -- as well as the integrity of state court findings accorded a presumption of correctness under §2254(d) -- depends on findings made by a state trial court and reviewed by the state appellate court.

necessary that appellant have any design to effect the victim's death...." 381 So.2d at 1011; A. 102.

The failure of any state court to focus on Reddix's personal responsibility is particularly keen in this case. For the record leaves open the question of the degree of Reddix's knowledge and intent. We know only that there was some plan and that, in the end, the victim was killed by the accomplice, Jones. We do not know what the original plan was. We do not know whether the plan was to take items while Weinberger's attention was engaged by Reddix, to bind him while the shop was looted, to hold him up, to render him unconscious, or to murder him. We do not know whether Reddix was a willing accomplice to murder or whether, because of the pliability resulting from his mental retardation and psychosis, see Tr. 20, Tr. 22, R. 207-08, he was the dupe of Larry Jones who improvised on his own, as the defense argued (see proposed instruction 6), and struck the victim.

Thus, this case stands in sharp contrast to each of the Eleventh Circuit cases that the state cites as evidence of a conflict between the circuits. There was no real Enmund issue in Henry v. Wainwright, 721 F.2d 990 (11th Cir. 1983), because Henry "perform[ed] the fatal act.... He had no accomplice." Id. at 995. In Green v. Zant, 738 F.2d 1529 (11th Cir. 1984), the jury made the determination: The "case ... was presented to the jury on a malice murder theory, rather than as felony-murder." Id. at 1534. Similarly, in Drake v. Francis, 727 F.2d 990 (11th Cir. 1984), the jury determined the only factual question relevant to the

Enmund issue. The state argued "that Drake was the actual murderer" and Drake maintained "his pure innocence and ignorance of the crime until after the fact." Id. at 997. Thus, the jury's guilty verdict necessarily embodied a finding that Drake was the actual killer. Ross v. Hopper, 716 F.2d 1528 (11th Cir. 1983), was also tried on the state's theory "that Ross himself was the triggerman." Id. at 1533.

Moreover, in Ross, as in Stanley v. Zant, 697 F.2d 955 (11th Cir. 1983), the Eleventh Circuit had the benefit of the Georgia Supreme Court's review of the record. In Ross, the circuit court based its holding that Enmund was satisified on "the record ... as construed by the Georgia Supreme Court...," citing that court's factual discussion and conclusion that Ross fired the murder weapon. 716 F.2d at 1532-33 (citing Ross v. State, 233 Ga. 361, 364, 211 S.E. 2d 356, 358 (1974)). In Stanley, the circuit court noted the Georgia Supreme Court's conclusion that the defendant was "an active participant ... in the killing," which included his "burying the victim while he was still alive." 697 F.2d at 973 (quoting Stanley v. State, 240 Ga. 341, 241 S.E.2d 173, 180 (1977)).[15/]

Thus, in each of the Eleventh Circuit cases cited by the petitioners there was the one thing missing in Reddix's case: A determination by a state court that the defendant

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15/ It should also be pointed out that the Eleventh Circuit has vacated its opinions in Ross and Drake and granted rehearing en banc. See Ross, 729 F.2d 1293 (11th Cir. 1984); Drake, 727 F.2d at 1003.

either killed or intended that a killing take place. The ruling below is not in conflict with those cases and the Court should not grant certiorari.

B. There Was No Finding by the Mississippi Supreme Court:

The state nevertheless argues that the Mississippi Supreme Court made a "finding" that resolved the factual question of Reddix's intent and was binding on the federal court under § 2254(d). But this ignores the plain fact that the Mississippi court started with the premise that: "It was not necessary that appellant have any design to effect the victim's death, while appellant was engaged to [sic] the commission of the crime of robbery." 381 So.2d at 1012; A. 102. It explicitly cited and relied on its prior cases stating the traditional felony-murder rule of accessorial liability. Id.

To be sure, the Fifth Circuit held that there was evidence from which the jury could have inferred intent.

> But there is a vast difference between permitting a factfinder to consider a defendant's willingness to engage in conduct which poses a substantial risk of death in deciding whether to infer that he acted with a purpose to take life, and defining such conduct as an ultimate fact equivalent to possessing a purpose to kill....

Lockett, 438 U.S. at 627 (White, J., concurring). Yet that is exactly the imputation indulged by the Mississippi Supreme Court, which held Reddix responsible simply because he participated in "the common design to rob." 381 So.2d at

1012; A. 102 (quoting Price v. State, 362 So.2d at 205).[16]

The most that can be said is that the Mississippi court took the record facts of robbery-murder and applied a presumption of intent. It recognized "that the record does not show what the plan was. The poet said that the best study of mankind is man, and Holy Writ says, 'By their fruits ye shall know them.'" 381 So.2d at 1011. It then shifted the burden to the defendant, Reddix, to disprove this presumption of intent: "There is no showing in this record that anything unanticipated occurred to throw them off balance or to change their course." Id. at 1011-12. Thus, the Mississippi court did not canvass the record and determine that it warranted a finding of intent to kill. Rather, it looked at the consequences of the defendant's actions and applied a presumption of intent. [17] Not only is this a far cry from a "finding" presumed correct under § 2254(d), it is the very legal reasoning condemned in Sandstrom.

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16/ This was precisely the standard applied to Sandra Lockett, whose jury was charged that "[a] person engaged in a common design to rob by force and violence ... is presumed to acquiesce in whatever may reasonably be necessary to accomplish the object of their enterprise...." Lockett, 438 U.S. at 626. Thus, just like Sandra Lockett, Reddix was "sentenced to death without a finding at any stage of the proceeding that [he] intended the death of those who were killed as a result of their criminal conduct." Id. (White, J., concurring).

17/ This was particularly inapt in Reddix's case; the psychiatrist concluded that, because of his mental state, Reddix "may often be unaware of the specific consequences of his decisions." R. 208.

(footnote continued)

What the Mississippi Supreme Court did was to allow a series of legal propositions to stand in for the missing factual finding: (1) No design to effect death was necessary for felony-murder, accomplice liability; (2) the defendant is presumed to have intended what in fact occurred; and (3) the defendant did not rebut this presumption with evidence that anything untoward happened.

Thus, the district court was correct in characterizing the Mississippi Supreme Court "finding" of intent as no more than a "bold inference." 554 F.Supp. at 1214; A. 43. Similarly, the court of appeals did not err when it reviewed the Mississippi court's opinion and concluded that "it does not supply the finding of personal intent required by Enmund." 732 F.2d at 495; A. 5.

In the end, the state acknowledges as much because it asks this Court to infer a finding under the principles of LaVallee v. Delle Rose, 410 U.S. 690 (1973): that where the state court applied the appropriate federal standard, its ruling on the merits may be interpreted to include a determination of the disputed facts. See Marshall v. Lonberger,

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17/ continued

It should also be noted that the presumption applied was not even that the defendant intended the natural consequences of his acts. It was a presumption that he intended the natural consequences of his and his accomplice's acts taken together, whether or not he knew what his accomplice would do.

Moreover, the Mississippi court applied this presumption at the appellate stage. In effect, it became a conclusive presumption; there was no way that Reddix as an appellant could have adduced evidence to rebut the presumption at that point.

___ U.S. ___, 74 L.Ed.2d 646, 658 (1983). But unlike LaVallee, 410 U.S. at 695, there is no indication here that the state court applied the correct standard. To the contrary, when the Mississippi Supreme Court decided Reddix's apppeal in 1980, the correct standard -- i.e., the Enmund decision -- was two years further in the future. The Mississippi court did not presage the Enmund standard; it specifically rejected it and held that intent was not necessary. 381 So.2d at 1012; A. 102. Thus, LaVallee provides the state no support; its invocation betrays that there were no state court findings, as the courts below correctly held.

## CONCLUSION

Reddix was sentenced to death without any finding by any court that he killed, attempted to kill, or intended that a killing take place. The courts below were correct in holding that this death sentence cannot stand. Acccordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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